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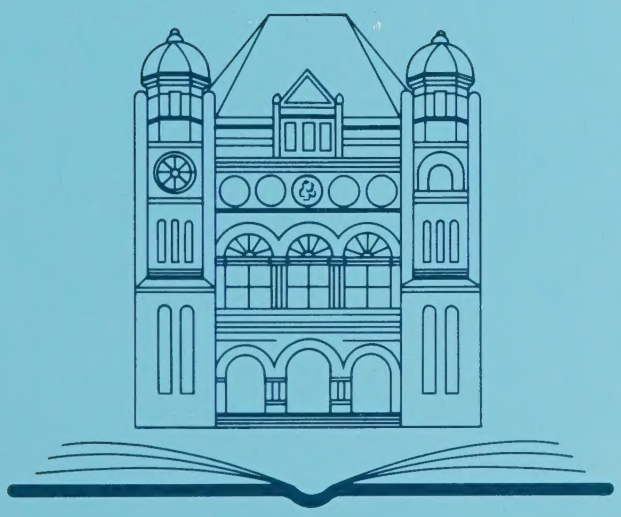

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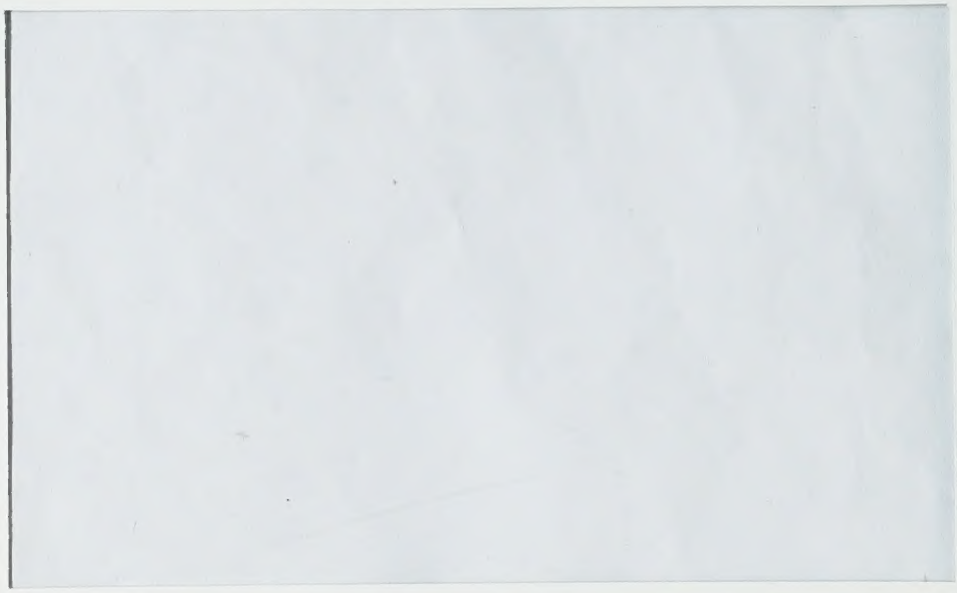

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THE CHARTER OF RIGHTS AND THE REDISTRIBUTION OF ELECTORAL DISTRICTS

Current Issue Paper 141

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Contents


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INTRODUCTION*

The *Canadian Charter of Rights and Freedoms* guarantees a variety of rights and freedoms, including what are known as "democratic rights." A little over four years ago the Supreme Court of Canada ruled that the drawing of provincial electoral boundaries was subject to one of those democratic rights—in particular, the right to vote. This right is found in section 3 of the *Charter*, which begins

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly...[1]

The following questions emerge: What criteria does section 3 impose on a provincial or federal redistribution scheme? For instance, must the same number of voters reside in each district? If absolute voter parity is not required, what deviations are permissible? Are there other provisions of the *Charter* which can affect the legality of a redistricting scheme for Ontario?

These questions arise within the context of the democratic theory of "representation by population" or "one person, one vote." This philosophy of representation holds that constituencies should be relatively equal in population, thereby making the value of each vote more or less equal.[2]

SUPREME COURT OF CANADA AND ELECTORAL BOUNDARIES

BACKGROUND

The Supreme Court of Canada addressed the above questions (apart from the last one) in *Reference re: Electoral Boundaries Commission Act*[3]—a case involving the redistribution of provincial electoral districts in Saskatchewan. The province's *Representation Act, 1989*[4] had established new electoral boundaries, which were based upon the recommendations of a commission created under an *Electoral Boundaries Commission Act*.[5] Among other things, this latter Act required the commission to create a fixed distribution of constituencies—29 urban, 31 rural, and 2 northern—with the boundaries of the urban ridings to coincide with existing municipal boundaries. Another provision called for a "constituency population quotient" to be obtained by dividing the total voter population by the total number of constituencies. Southern ridings were permitted a population variance of ±25% from this quotient; in the case of the northern ridings, the variance could be up to 50%.[6]

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*This paper is designed to be read in conjunction with Current Issue Paper (CIP) 24, *The Redistribution of Electoral Districts in Ontario* (revised May 1993). CIP 24 reviews the last three redistributions in Ontario; emphasis is placed in the paper upon the composition, mandate, procedure, and reports of the various electoral boundaries commissions, as well as the criteria applied by each commission. CIP 24, however, does not look at the impact of the *Charter of Rights* on criteria for redistribution in Ontario.

On a reference to the Saskatchewan Court of Appeal, the Saskatchewan government asked the following two questions in respect of the constituencies defined in the *Representation Act, 1989*:

- Did "the variance in the size of voter populations among those constituencies" contravene the *Charter of Rights*? and

- Did "the distribution of those constituencies among urban, rural and northern areas" also contravene the *Charter*?

The Court of Appeal responded "yes" to both these questions. In particular, it held that the electoral boundaries violated the right to vote guaranteed by section 3 of the *Charter* and, with the exception of the two northern ridings, could not be justified under section 1.[7]

By way of background, it should be noted that section 1 of the *Charter* contemplates a two-stage process for the judicial review of legislation. In the first stage, the court must determine whether the challenged law limits a guaranteed right or freedom. If the challenged law has this effect, the second stage is reached: here section 1 is invoked and the court must decide whether the limit is a reasonable one that can be demonstrably justified in a free and democratic society.[8]

Deviation From "One Person — One Vote": Application of Section 3 of the *Charter*

On appeal, a majority of the Supreme Court of Canada disagreed with the Saskatchewan Court of Appeal and held that section 3 of the *Charter* had not been violated. Writing for the majority, McLachlin J. succinctly defined the issue before the Court:

> The question for resolution on this appeal can be summed up in one sentence: to what extent, if at all, does the right to vote enshrined in the Charter permit deviation from the "one person — one vote" rule?[9]

McLachlin J. concluded that the purpose of the right to vote in section 3 was not equality of voting power per se, but the right to effective representation. Canada was a representative democracy, and each citizen was entitled to be represented in government. She continued that one of the conditions of effective representation was relative parity of voting power. A system which diluted one citizen's vote unduly as compared with another's ran the risk of providing inadequate representation to the citizen whose vote was diluted. The legislative power of that citizen would be reduced, as might access to and assistance from his or her representative. The result would be uneven and unfair representation.[10]

But the need for parity of voting power did not extend to absolute parity which was "impossible." Voters died and voters moved. As a result, it was impossible to draw boundary lines which guaranteed exactly the same number of voters in each district.[11]

Was the objective, then, as much relative parity as might be possible to achieve? McLachlin J. answered "no." Other factors might have to be taken into account:

> …such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. *Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic.*[12] [emphasis added]

These factors were simply examples of considerations which might justify departure from absolute voter parity in the pursuit of more effective representation. (The list was not exhaustive.)

The following principle thus emerged:

> …deviations from absolute voter parity may be justified on the grounds of practical impossibility or the provision of more effective representation. Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced.[13]

After discussing the meaning of the right to vote, McLachlin J. asked: "Do the Saskatchewan boundaries violate the right to vote?" Earlier she had said that it was the boundaries themselves (as opposed to legislation) which were directly at issue on the appeal.

The majority concluded that in general, the discrepancies between urban and rural ridings were small, no more than expected given the greater difficulties associated with representing rural ridings. "And discrepancies between particular ridings appear to be justified on the basis of factors such as geography, community interest and population growth patterns."[14] It was furthermore noted that the inappropriateness of the northern boundaries had not been seriously suggested, given the sparse population and the difficulty of communication in the area. Section 3 of the *Charter* had therefore not been violated and in these circumstances it was unnecessary to consider section 1.[15]

COMMENTS

Representation of Rural and Urban Voters

The Supreme Court decision has been the subject of much controversy, especially with regards to the representation of rural and urban voters. The *Toronto Star*, for instance, said that the Court had "rubber-stamped a cockamamie Saskatchewan election map that unfairly shifts power to rural voters at city-dwellers' expense." It then contrasted Premier Devine's Progressive Conservatives who were "rural-based" with the "urban-rooted" New Democrats.[16] In a similar vein, the *Globe and Mail* claimed that the Supreme Court in a "surprising and disturbing" ruling had given its seal of approval to "rampant inequity in the weighting of Canadians' votes."[17] Two political scientists from the University of Calgary stated that the Court had upheld systematic discrimination against city dwellers and that the decision "will be relegated to the trash can of history."[18]

It should be noted that the Supreme Court did acknowledge that rural areas in Saskatchewan were somewhat overrepresented and urban areas somewhat underrepresented; however, these deviations were considered by the majority to be "relatively small."[19] The rural areas had 53.0% of the seats and 50.4% of the population, whereas the urban areas had 43.9% of the seats and 47.6% of the population. The majority reviewed previous urban/rural deviations in Saskatchewan and concluded that

> ...the effect of the allocation of seats to urban and rural ridings in the 1989 legislation was mainly to increase the number of urban seats to reflect population increases in urban areas. *This belies the suggestion that the 1989 Act was an unjustified attempt to adjust boundaries to benefit the governing party.*[20] [emphasis added]

Later in the judgment the Court referred to "the fact that it is more difficult to represent rural ridings than urban."*[21] Material presented to it suggested that

- rural ridings were harder to serve because of difficulty in transport and communications; and

---

* A different conclusion has been expressed by the Supreme Court of Prince Edward Island in the case of that Province. In *MacKinnon v. Prince Edward Island* (1993), 101 D.L.R. (4th) 362, it held that the evidence did not establish as a "practical reality" that it was more difficult to represent rural than urban ridings in the Province. (p. 391) The Court concluded that

> in the Prince Edward Island context, unlike the situation in Saskatchewan, the goal of effective representation does not justify any appreciable lower voter populations in rural areas based on a perceived difficulty to represent rural ridings. (p. 392)

The *MacKinnon* decision is discussed later in this paper under "Other Court Decisions: An Overview".

- rural voters made greater demands on their elected members, whether because of the absence of alternative resources available in urban centres or for other reasons.

Thus, "the goal of effective representation may justify somewhat lower voter populations in rural areas."[22]

Population Criteria: General

The rural/urban representation issue can be seen as part of the larger question of population criteria for ridings. Robert Charney, then a lawyer with the Constitutional Law and Policy Division of the Ontario Ministry of the Attorney General, pointed out that the Saskatchewan electoral scheme permitted the largest riding to have twice the population of the smallest riding and still was held not to violate section 3. He wrote that if that kind of population disparity did not run afoul of the requirement of relative parity, one was left to wonder just how much vote dilution the Court would tolerate before the onus shifted to the government under section 1 of the *Charter* to justify the scheme.[23]

Robert Richards and Thomas Irvine, who appeared before the Supreme Court of Canada as counsel for the Attorney General of Saskatchewan, have also commented on the population implications of the Court's decision. They believed that one of the unresolved issues was the question of how far ridings could be moved away from strict population equality before *Charter* problems were encountered. One possibility was that, with the exception of especially remote regions, variations much beyond ±25% would be constitutionally suspect. However, they felt that "exactly where the lines of constitutional tolerance might be drawn is difficult to predict."[24] The map before the Court in the Saskatchewan case involved deviations in the southern ridings ranging from -24% to +24% from the electoral quotient.

Approaches to Electoral Redistribution: Assessment of Chief Election Officer of Ontario

In November 1992 Warren Bailie, the Chief Election Officer of Ontario and a member of the last Ontario Electoral Boundaries Commission, coauthored an article on the Supreme Court decision in which he highlighted two significantly different approaches to electoral redistribution. One general approach was rooted in the principle that equality of voting power must govern any redistribution; the other was based on the understanding that a variety of socioeconomic factors (which included population) had to be taken into account when drawing up boundaries. The latter approach was "pluralistic"; had been upheld by a majority on the Supreme Court; and had been adopted by federal and provincial electoral boundaries commissions through their words and deeds.[25]

Mr. Bailie's endorsement of the pluralistic approach elaborated upon the factors of geography, communities of interest, and minority representation (whose relevance had been acknowledged by the Supreme Court) as follows:

- *Geography.* Notwithstanding modern communication technologies, members from geographically large constituencies just could not provide the same quality of "human" interaction with constituents as could urban members.

- *Communities of interest.* It was a sociological fact that individuals formed themselves into various geographically-based communities, that these collectivities reflected important interests, and that there was a necessity to ensure that such collectivities were represented in legislatures.[26]

- *Minority Representation.* Certain distinct minority groups had suffered from systemic discrimination. Strong moral reasons existed for affording such groups special representational rights as a means of eliminating this discrimination.

Bailie then wrote that admittedly, decision-making which entailed the recognition and balancing of the various factors was "trying, often subjective and thus open to dispute."[27]

As recognized by the Chief Election Officer's article, there are those who do not share a belief in the pluralistic approach. One political science professor, for instance, has written that

> ...by adhering to the basic tenets of the pluralist approach, the [Supreme Court] decision does damage to the workings of democracy within this country.[28]

The professor in question believes that "substantial elector equality" serves as the fundamental principle underlying the democratic nature of the electoral system in Canada. Furthermore, it represents

> a practical method of distribution which, in contrast to the pluralist approach, is relatively uncomplicated and easily understood and operationalized. As such, it is a principle and practice which should be circumscribed as little as possible.[29]

Other Court Decisions: An Overview

Cases involving the constitutionality of provincial electoral boundary redistributions have arisen not only in Saskatchewan—the source of the one Supreme Court of Canada judgment on the issue—but also in British Columbia, Alberta, and Prince Edward Island.[30] As revealed below, the Supreme Courts of

British Columbia and Prince Edward Island have found *Charter* violations in provincial electoral boundary legislation. The Alberta Court of Appeal, on the other hand, has twice refused to condemn boundary provisions.

BRITISH COLUMBIA: *DIXON V. BRITISH COLUMBIA (ATTORNEY-GENERAL)*

In the 1989 decision of *Dixon v. British Columbia (Attorney-General),* Chief Justice McLachlin of the British Columbia Supreme Court (prior to her elevation to the Supreme Court of Canada) ruled that the provincial legislation establishing electoral districts violated section 3 of the *Charter*. More particularly, speaking on behalf of the Court she found "anomalies [which] cannot but suggest a *gross violation* of the fundamental concept of representation by population which is the foundation of our political system" [emphasis added].[31] One riding, for example, had 15 times as many voters as another.

The Court then had to assess whether the infringement of section 3 was saved by section 1 of the *Charter*.* On this issue, it found the objectives of ensuring that geographic and regional concerns were reflected in electoral boundaries to be "pressing and substantial"; however, the means chosen to attain these ends were not proportional to the goal. As stated by the Court, "in many cases no good end seems to be served by existing population inequities..."[32] Accordingly, the provisions in question were held to be contrary to the *Charter of Rights*. The following remedy was granted:

> Pending submissions on what time period may reasonably be required to remedy the legislation and the expiry of that period, the legislation will stay provisionally in place to avoid the constitutional crisis which would occur should a precipitate election be required.[33]

Subsequently, the petitioner, Dixon, applied unsuccessfully for an order declaring the legislation void as of June 30, 1989 (or such other date deemed just by the Court). The Court felt that "it must be left to the legislature to do what is right in its own time."[34] Two months after this judgment, electoral boundaries legislation was passed by the British Columbia Legislature.[35]

---

* In *Dixon* McLachlin C.J.S.C. explained the two-step inquiry required by section 1 in the following way: When was the limit on a *Charter* right or freedom "reasonable" and "demonstrably justified in a free and democratic society"? First, the importance of the objective underlying the impugned law had to be assessed. In order to override a *Charter* right, the objective had to relate to concerns which were "pressing and substantial" in a free and democratic society. The second step involved a proportionality test whereby the court had to examine the nature of the right, the extent of its infringement, and the degree to which the limitation furthered the attainment of the desirable goal embodied in the legislation. The ultimate question was: Were the means chosen to attain the valid objective (the legislation, regulations, or government conduct under question) proportional or appropriate to the ends? (pp. 270-271)

ALBERTA

Case No. 1: Reference re Electoral Boundaries Commission Act

In a 1991 Alberta case, which unlike *Dixon* was decided after the Supreme Court of Canada decision, the Alberta Court of Appeal upheld the constitutionality of the province's *Electoral Boundaries Commission Act*.[36] This Act prescribed basic criteria for boundaries and established a boundaries commission, but did not actually create the electoral districts. For this, further legislation was required. In upholding the Act, the Court applied the following test:

> We must ...ask ourselves whether a boundary rule or decision is clearly wrong. In other words, we should not interfere unless a rule or decision is demonstrably unjustified, palpably wrong or manifestly unreasonable.[37]

The "most difficult question" for the Court was assessing the justification for 40 rural seats (including five mixed urban and rural), instead of a number closer to 33 that would reflect voter parity. It concluded that "in all the circumstances, we cannot say the choice is clearly wrong."[38]

Case No. 2: Reference re Electoral Divisions Statutes Amendment Act, 1993

Background

In February 1993, the Alberta Legislature passed the *Electoral Divisions Statutes Amendment Act, 1993*.[39] Among other things, the Act amended the *Electoral Boundaries Commission Act* and the *Electoral Divisions Act*.[40] A new schedule to the latter Act defined the boundaries of the electoral divisions.

The following month the Alberta Government asked the Court of Appeal to determine if the new boundaries complied with the *Charter*.[41] That same month a separate action against the boundaries was also launched by the Town of Lac La Biche; this action, however, was later discontinued.[42]

The new boundaries were proclaimed in force in May 1993, and accordingly were in effect for the general election of June 1993.

Decision of the Court of Appeal

Following the election, in October 1994 the Alberta Court of Appeal ruled on the Reference from the Government of Alberta. The Court decided "despite some hesitation" to once again refuse to condemn Alberta's electoral boundaries.[43]

The Court observed that the average electoral division in Edmonton and Calgary contained 13 percent more voters than the average of other divisions. It continued:

> The *Canadian Charter of Rights and Freedoms* guarantees those urban electors the right not to have the political force of their votes unduly diluted. We simply are unable to say, for lack of an explanation for the present boundaries, whether the dilution that exists today is "undue" [i.e., whether the *Charter* has been contravened].[44]

The Court pointed out that the Legislature offered no reasons for the particular boundaries, but had essentially adopted the recommendations of a Select Special Committee on Electoral Boundaries. That Committee's report did not provide detailed reasons for the proposed boundaries.[45]

Although the Court could not decide whether a violation of the *Charter* had taken place, it did think that there may well have been regard for an irrelevant consideration in drawing the boundaries.[46] The irrelevant factor was a desire not to offend unduly the political sensibilities of some non-urban electors.[47] In this regard, the Court acknowledged that

> There can be many valid reasons for disparity [in the number of voters], but they do not include a fear of the future by electors whose electoral divisions might be subject to surgery to assure other electors their constitutional rights. Constitutional rights must be respected even if to do so is momentarily unpopular.[48]

Near the end of the judgment, before reviewing possible solutions to Alberta's representation problem,[49] the Court made some general statements on the origin and nature of the problem. The origin lay in "the historic imbalance in the level of representation between agrarian and non-agrarian populations in Alberta."[50] Each year the problem worsened as urban populations grew and non-urban populations declined. The Court then explained that

> We call this a problem because it impacts significantly on the right to vote of urban Albertans. *This cannot be permitted to continue if Alberta wishes to call itself a democracy.*[51] [emphasis added]

The Court concluded that the existing inadequacy in the boundaries was not so glaring as to invalidate the existing legislation. Alberta had already had a general election based on the boundaries and the Court did not see the democratic value in creating a political crisis. It did think, however, that "a new and proper review" was "essential" before the constitutional mandate of the current government expired, and that hopefully the review would take place before the next election.[52]

Electoral Boundaries Commission Amendment Act, 1995

In June 1995 a new electoral boundaries commission was appointed under the *Electoral Boundaries Commission Amendment Act, 1995*. The Act requires the commission to complete interim and final reports within 12 months of its appointment.[53]

Although previous legislation had explicitly required boundaries commissions to take the *Charter* into account, the 1995 amendments expanded upon that requirement by adding the following underlined words

> 16...the Commission...shall take into consideration
>
> (a) *the requirement for effective representation as guaranteed by* the *Canadian Charter of Rights and Freedoms*. [emphasis added]

With respect to the population of proposed electoral districts, the 1995 legislation did not change the general variance of ±25% from the average population of all the districts. It also did not amend the provision whereby under certain conditions, four districts might have a variance of 50% below the average.[54]

PRINCE EDWARD ISLAND

MacKinnon v. Prince Edward Island

In 1993 in the case of *MacKinnon v. Prince Edward Island*, the Prince Edward Island Supreme Court, Trial Division, held that the legislative provisions defining the Province's electoral districts violated the right to vote guaranteed by s. 3 of the *Charter*, and were accordingly "null and void". More specifically, the Court found that the districting scheme provided inadequate representation to a large percentage of voters because of the "significant variances" in population in the districts.[55] The judgment explained that

> ...Factors like community history, communities of interest and the need to maintain an appropriate urban/rural and regional balance in political representation in the Province do not support a conclusion that the *existing extreme deviations* are necessary to ensure the better government of the populace as a whole.[56] [emphasis added]

Earlier it had been pointed out that at the extremes, one district had 63% fewer voters than the provincial average, whereas another had 115% above that average, producing a total variance of 178%. *The majority of the districts had disparities of at least ±40% from the average.*[57]

Similar to the British Columbia Supreme Court in *Dixon*, the Court ruled that the infringement of s. 3 was not saved by s. 1 of the *Charter*. In applying s. 1, the

Court was "satisfied that the objectives of ensuring an appropriate urban/rural and regional balance in political representation in the Province to ensure better government" were "pressing and substantial". But it was not satisfied that the means adopted to attain those objectives were proportional or appropriate.[58]

Rather than strike down the disputed provisions, the Court followed the approach in *Dixon* and decided that

> Pending the necessary legislative action to remedy the legislation, it will stay provisionally in place to avoid any constitutional crisis.[59]

The Court added that

> If remedial action is not taken within a reasonable period of time, submissions as to the appropriate period necessary to remedy the legislation may be made to the court.[60]

Redistribution of 1993-94

The decision of the Supreme Court led directly to the formation of an "Election Act and Electoral Boundaries Commission" later that year.[61] The following year (in March 1994) the Commission's report included a proposed variance of ±15% from the average number of voters per district. It considered this degree of variance to be "workable, taking into account district sizes, relative voter parity and a number of other important considerations including communities of interest and geographic features."[62]

Less than three months later (in May 1994) an *Electoral Boundaries Act* was passed. It set new electoral boundaries, and required future boundaries commissions to operate on the basis of a voter population variance of ±25%, not the ±15% proposed by the Commission. Subject to this variance factor, boundaries commissions were explicitly required under the legislation to take into consideration the *Charter of Rights* and other factors.[63]

Eight communities, including the City of Charlottètown, have launched a *Charter* challenge to the new boundaries in the Supreme Court of Prince Edward Island. The application to the Court lists various reasons why section 3 of the *Charter* has been violated, including that

> (1) the Commission's mandate for recommending to the Legislative Assembly the boundaries of the electoral districts within ±25% variance (section 17(2)) provides for significantly more latitude than is necessary in order to achieve relative voter parity in Prince Edward Island;

> (2) while the **Commission** is required not to recommend in its report to the Legislative Assembly deviations in voter districts which are "more than 25 per cent above, nor more than 25 per cent below the average number electors of all the proposed districts" (total allowable deviation of 50%), there is no provision in the Act which requires the **Legislative Assembly** to maintain voter districts in the Province within any maximum deviation, with the result that no degree of deviation between the size of voter districts will trigger a legislative requirement for a redistribution of the twenty-seven (27) electoral districts;[64] [bolding appears in original]

*****

OTHER SECTIONS OF THE CHARTER

GENERAL

In each of the above-mentioned judgments on compliance with the *Charter* (apart from the second Alberta judgment), the courts decided whether the boundary schemes in question violated section 3. But were any conclusions reached about the violation of other sections of the *Charter*? The United States Supreme Court, for example, has derived a principle of equality of voting power from the guarantee of "equal protection of the laws" (the fourteenth amendment) in the *American Bill of Rights*.[65] Have the courts in Canada derived a similar principle from the equality rights provision of the *Charter*?

A review of the case law shows very little discussion of whether a redistribution scheme might contravene any *Charter* rights and freedoms, apart from the right to vote. The issue, for instance, was not addressed at all by the Supreme Court of Canada.[66]

BRITISH COLUMBIA: THE *DIXON* CASE

In the British Columbia case, the petitioner argued that the province's system of electoral boundaries violated not only section 3 of the *Charter* (a democratic right), but also sections 2(b) (the right to freedom of expression), 7 (the right to liberty—one of the legal rights) and 15 (equality rights). The British Columbia Supreme Court dealt very briefly with these other sections of the *Charter*, stating that

> It is difficult to accept...that the framers of the Charter . . . intended that the [democratic] rights thus conferred could be added to or subtracted from by what they laid down in connection with legal rights or equality rights.[67]

The Court continued that if this were so, the notwithstanding clause could be used to pass legislation adversely affecting electoral rights. (Legal and equality rights are subject to the notwithstanding clause, but democratic or electoral rights, such as the right to vote, are not.) As explained by the Court

> This [determining that electoral rights are modified by legal and equality rights] would tend to dilute the paramount position of those [electoral] rights and to defeat the obvious intention of the framers of the Charter that the democratic rights of Canadians should be beyond legislative reach except through the constitutional amendment process.[68]

Having made these comments and having found that the electoral boundaries violated section 3, the Court ruled it was "unnecessary" to consider whether other sections of the *Charter* had been violated.[69]

ALBERTA: THE TWO CONSTITUTIONAL REFERENCES

The first Alberta judgment raised the issue of possible attacks against electoral boundaries under other *Charter* sections, but without elaboration. More particularly, the Alberta Court of Appeal said

> We cannot, in an adversarial vacuum, assess this law [the province's *Electoral Boundaries Commission Act*] under every term in the Charter. We think, for example, of possible attacks under ss. 15, 27 [multicultural heritage] and 28 [rights guaranteed equally to both sexes]. We limit our comments to s. 3.[70]

As mentioned previously, in the second Alberta judgment the Court of Appeal felt that it could not say whether the *Charter* had been violated at all (let alone sections other than section 3) since it lacked enough information. The Court referred, however, to a section 15 argument having been put forward by the Alberta Civil Liberties Association. The Court commented

> [The Association]...argued that under-representation of voters in the inner areas of Calgary and Edmonton constitutes systemic discrimination against members of certain disadvantaged minority groups, namely the disabled, women, single parents, the elderly, immigrants, the poor, and the unemployed who inhabit those areas in disproportionate numbers, and is contrary to s. 3 and s. 15(1) of the *Charter*.[71]

PRINCE EDWARD ISLAND: THE *MACKINNON* CASE

In the Prince Edward Island case, the applicant alleged possible infringement of a number of *Charter* sections (2(b), 3, 6, 7, 15), but the only issue at trial related to a possible infringement of section 3.[72]

FUTURE COURT CHALLENGES

Redistributions, then, might continue to face challenges under various sections of the *Charter*, and not just section 3. In *Constitutional Law of Canada* Peter Hogg has commented on one such challenge—an attack under section 15, the equality guarantee. However, he questions whether an equal protection argument based simply on inequality of voting power would succeed:

> Despite the success of the equal protection argument in the U.S.A., s. 15 might not extend to disparities in voting power because of the need [under the case law] to show discrimination on the basis of the listed or analogous grounds.[73]

Another constitutional law professor, Kent Roach, has looked at the applicability of section 15 in the context of minority representation and concluded that

> Litigation alleging discrimination in districting remains a possibility in Canada. Such cases will not be easy to litigate but our section 15 jurisprudence, with its focus on discriminatory effects as opposed to purposes, will ease the burden of proving a constitutional violation.[74]

Section 15 litigation may thus hold that districting practices that dilute a minority's voting strength have discriminatory effects.[75] Roach, though, does not believe that discriminatory districting litigation will always succeed.[76]

Some other issues which might be raised before the courts include[77]

- the specific factors which can legitimately be used as a basis for moving away from strict equality in riding size, and their relative weight. The Supreme Court of Canada did not purport to provide an exhaustive list of such factors;
- the degree to which riding populations can vary and still be constitutionally sustainable;
- the appropriate population base for determining constituency size. Should it be voter population or overall population?

- whether the constitutional validity of a redistribution can be eroded over time. Even the most perfectly drawn map can quickly go out of date if there are major shifts in population.

As the above discussion reveals, the courts have only *begun* to address the impact of the *Charter* on the redistribution of electoral districts.

NOTES

[1] Part I of the *Constitution Act, 1982* (R.S.C. 1985, Appendix II, No. 44), s. 3.

[2] See Canada, Royal Commission on Electoral Reform and Party Financing (Pierre Lortie, Chair), *Reforming Electoral Democracy: Final Report* (Ottawa: Supply and Services Canada, 1991), vol. 1, p. 136.

[3] (1991), 81 D.L.R. (4th) 16.

[4] S.S. 1989-90, C. R-20.2.

[5] S.S. 1986-87-88, c. E-6.1.

[6] S.S. 1986-87-88, c. E-6.1, ss. 14-17 and 20.

[7] *Reference re: Electoral Boundaries Commission Act* (1991), 78 D.L.R. (4th) 449.

[8] See Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, looseleaf), section 35.1, as of 1994.

[9] (1991), 81 D.L.R. (4th) 16 at 34. Included in the majority were McLachlin, La Forest, Gonthier, Stevenson and Iacobucci JJ. Sopinka J. wrote separate concurring reasons.

[10] Ibid., p. 35.

[11] Ibid., p. 36.

[12] Ibid.

[13] Ibid.

[14] Ibid., p. 45.

[15] The dissenting justices, on the other hand, found a violation of section 3 which was not saved by section 1. It had not been established that there was a "pressing or substantial need" either to impose a fixed quota of urban and rural ridings or to confine the urban ridings to existing municipal boundaries. Even assuming such a need, it could not be said that the rights of urban voters had been interfered with as little as possible. Ibid., p. 29 (Cory J., Lamer C.J.C. and L'Heureux-Dubé J. concurring).

[16] "A sparkling dissent," *Toronto Star*, 12 June 1991, p. A24.

[17] "What your vote's worth," *Globe and Mail*, 7 June 1991, p. A14.

[18] D.J. Bercuson and Barry Cooper, "Maintaining a tyranny of the minority," *Globe and Mail*, 18 June 1991, p. A15.

[19] *Reference re: Electoral Boundaries Commission Act* (1991), 81 D.L.R. (4th) 16 at 42.

[20] Ibid.

[21] Ibid., p. 44.

[22] Ibid.

[23] Robert E. Charney, "*Saskatchewan Election Boundary Reference*: 'One Person — Half a Vote'," *National Journal of Constitutional Law* 1:2 (November 1991): 228. Charney believed that the Supreme Court of Canada decision may have rendered section 3 of the *Charter* "an ineffectual safeguard against political gerrymandering" (p. 225).

[24] Robert G. Richards and Thomson Irvine, "Reference re Provincial Electoral Boundaries: An Analysis," in John C. Courtney, Peter MacKinnon, and David E. Smith, eds. *Drawing Boundaries: Legislatures, Courts, and Electoral Values* (Saskatoon: Fifth House Publishers, 1992), p. 59.

[25] Warren R. Bailie and David Johnson, "Drawing the Electoral Line," *Policy Options* (November 1992): 23-24.

[26] Alan Stewart, the Secretary of the last Ontario Electoral Boundaries Commission and Special Adviser (Legal) to the Chief Election Officer, has written that the rationale of the principle of community of interest is that electoral districts "should be, as far as possible, cohesive units, areas with common interests related to representation." They must be more than arbitrary, random groupings of individuals. Stewart, "Community of Interest in Redistricting," in David Small, ed., *Drawing the Map: Equality and Efficacy of the Vote in Canadian Electoral Boundary Reform*, prepared for the Royal Commission on Electoral Reform and Party Financing, v. 11 of the Research Studies (Toronto: Dundurn Press, 1991), p. 124.

[27] Bailie and Johnson, "Drawing the Electoral Line," p. 24.

[28] David Johnson, "Canadian Electoral Boundaries and the Courts: Practices, Principles and Problems," *McGill Law Journal* 39 (March 1994): 247.

[29] Ibid., p. 246.

[30] In October 1990, a claim challenging the electoral districts legislation of the Northwest Territories (NWT) was filed with the NWT Supreme Court. The claim alleged violations of ss. 2(b), 3, 6, 7, and 15(1) of the *Charter of Rights*, but was discontinued. This court action is reviewed in Joan Irwin, *Electoral Boundaries*, Briefing Note (Yellowknife: Research Services,

Northwest Territories Legislative Assembly, 1993).

[31] (1989), 59 D.L.R. (4th) 247 at 268.

[32] Ibid., p. 272.

[33] Ibid., p. 284.

[34] *Dixon v. B.C. (A.G.)* (1989), 37 B.C.L.R. (2d) 231 at 235.

[35] *Electoral Boundaries Commission Act*, S.B.C. 1989, c. 65.

[36] S.A. 1990, c. E-4.01. The Court answered "in general terms that the manner in which boundaries and areas are proposed and established under the Act seems not to offend s. 3 of the *Charter* in the sense that the general scheme of the Act is of the sort approved by the Supreme Court of Canada in *Reference re Provincial Electoral Boundaries*." *Reference re Electoral Boundaries Commission Act (Alberta)*, [1992] 1 W.W.R. 481 at 488.

[37] *Reference re Electoral Boundaries Commission Act (Alberta)*, pp. 487-488.

[38] Ibid., pp. 489 and 491.

[39] S.A. 1993, c. 2. Technical and clerical errors in the legal descriptions of the electoral divisions were corrected by the *Electoral Divisions Amendment Act, 1993*, S.A. 1993, c. 4.

[40] S.A. 1983, c. E-4.05.

[41] Alberta, O.C. 215/93, 24 March 1993.

[42] *Town of Lac La Biche v. The Queen*, Court of Queen's Bench of Alberta, Judicial District of Edmonton, No. 9303 05191. In the "Originating Notice" (issued 10 March 1993) the Town alleged that the electoral division in which it was to be located had been established in a manner contrary to s. 3 of the *Charter*. One of the particulars was that there had been a failure "to properly consider the geography, community history, community interests, economic linkages and trading patterns, and other relevant matters" (p. 4). The action was discontinued after the Alberta Court of Appeal in April 1993, refused to grant an interim injunction on the proclamation of the province's new electoral boundaries. See *Lac La Biche (Town) v. Alberta* (1993), 102 D.L.R. (4th) 499; and Alberta Justice, "Electoral Boundaries Injunction Lifted," *News release*, 30 April 1993, p. 1.

[43] *Reference re Electoral Divisions Statutes Amendment Act, 1993 (Alberta)* (1995), 119 D.L.R. (4th) 1 at 2.

[44] Ibid., p. 3.

[45] Ibid., pp. 8-9 and 13.

[46] Ibid., p. 14.

[47] Ibid., p. 15.

[48] Ibid., p. 3.

[49] The Court felt there were only three possible solutions:

- a mixing of urban and non-urban populations in constituencies of equal size;
- more seats overall; or
- fewer non-urban seats.

It saw the third possibility as the *only* solution unless the people of Alberta softened their attitude towards the other two. See Ibid., pp. 17-18.

[50] Ibid., p. 17.

[51] Ibid.

[52] Ibid., p. 18. This decision of the Alberta Court of Appeal was appealed by the Town of Lac La Biche and the Alberta Civil Liberties Association to the Supreme Court of Canada. The appeal was later discontinued. *Town of Lac La Biche v. Alberta*, [1994] S.C.C.A. No. 500, File No.: 24413.

[53] Bill 20, *Electoral Boundaries Commission Amendment Act, 1995*, 3rd Sess., 23rd Leg. Alta. 44 Eliz. II, 1995 (assented to 17 May 1995), ss. 4-6; Legislative Assembly of Alberta, "Electoral Boundaries Commission Appointed," *News release*, 28 June 1995.

[54] *Electoral Boundaries Commission Act*, S.A. 1990, c. E-4.01, s. 17.

[55] (1993), 101 D.L.R. (4th) 362 at 393. The decision in *MacKinnon* is reviewed in Ronald E. Fritz, "Effective Representation Denied: *MacKinnon v. Prince Edward Island*," *National Journal of Constitutional Law* 4 (April 1994): 207-222. One of Fritz's conclusions holds that "the case vividly demonstrates that challenging constituency boundaries by way of a constitutional reference, as was attempted in the Saskatchewan and Alberta cases, does not represent the best avenue." (p. 221)

[56] Ibid.

[57] Ibid., p. 374.

[58] Ibid., p. 394.

[59] Ibid., p. 399.

[60] Ibid. An appeal of the decision was abandoned by the Government of Prince Edward Island in June 1993.

[61] Prince Edward Island, Election Act and Electoral Boundaries Commission (Lynwood MacPherson, Chair), *Report* (Charlottetown: The Commission, 1994), p. 9.

[62] Ibid., p. 28.

[63] S.P.E.I. 1994, c. 13, ss. 2-5, 17, and Schedule.

[64] *City of Charlottetown et al. v. Prince Edward Island*, "Application," Supreme Court of Prince Edward Island, Trial Division, No. GSC/14198, 17 February 1995, pp. 9-10. The eight applicants are the City of Charlottetown, the Community of West Royalty, the Community of Hillsborough Park, the Community of Sherwood, the Community of Winsloe, the Town of Summerside, the Town of Parkdale, and the Community of East Royalty.

[65] See the discussion in *Dixon* (1989), 59 D.L.R. (4th) 247 at 260-262.

[66] The reference to the Supreme Court of Canada asked whether the boundaries were consistent with the *Charter* as a whole, and not just section 3. The Supreme Court, however, interpreted the questions narrowly, holding that "the basic question put to this court is whether the variances and distribution reflected in the constituencies themselves violate the Charter guarantee of the right to vote" (1991), 81 D.L.R. (4th) 16 at 31. The same approach had been adopted by the Saskatchewan Court of Appeal. "The essential questions are whether the legislative framework at issue infringes the voting rights guaranteed under s. 3 of the Charter, and if so, whether the infringement is justified under s. 1 of the Charter" (1991), 78 D.L.R. (4th) 449 at 453.

[67] *Dixon* (1989), 59 D.L.R. (4th) 247 at 269.

[68] Ibid.

[69] Ibid., pp. 269-270.

[70] *Reference re Electoral Boundaries Commission Act (Alberta)*, [1992] 1 W.W.R. 481 at 485.

[71] *Reference re Electoral Divisions Statutes Amendment Act, 1993 (Alberta)* (1995), 119 D.L.R. (4th) 1 at 10.

[72] See *MacKinnon v. Prince Edward Island*, "Application," Supreme Court of Prince Edward Island, Trial Division, 13 February 1991, pp. 1-2 and (1993), 101 D.L.R. (4th) 362 at 364.

[73] Hogg, *Constitutional Law of Canada*, section 42.1(c), footnote 21. The listed grounds are "race, national or ethnic origin, colour, religion, sex, age

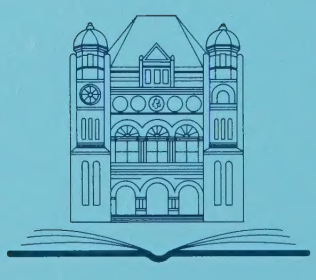
or mental or physical disability." Analogous grounds involve immutable personal characteristics. See Hogg, section 52.7(e).

[74] Kent Roach, "Chartering the Electoral Map into the Future," in *Drawing Boundaries*, p. 211.

[75] Ibid., p. 213.

[76] Ibid., p. 211.

[77] This list is derived primarily from Richards and Irvine, pp. 58-62. Altogether, Richards and Irvine highlight seven issues which they consider unresolved in the wake of the Supreme Court of Canada decision.



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